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Attorneys for Plaintiff
FLUKE ELECTRONICS CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FLUKE ELECTRONICS CORPORATION a
Washington corporation,

Plaintiff,

v.

STEPHEN MANGELSEN, a California resident,

Defendant.

STEPHEN MANGELSEN, a California resident,

Cross-Complainant,

v.

CLIFTON WARREN, a California resident;
FLUKE ELECTRONICS CORPORATION, a
Delaware corporation; inclusive,

Cross-Defendants.

Case No.: C 08 01188 JW

**FLUKE ELECTRONICS
CORPORATION'S NOTICE OF AND
BRIEF IN SUPPORT OF ITS MOTION
TO DISMISS FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN
BE GRANTED (RULE 12(b)(6))**

Hearing Date: September 15, 2008
Hearing Time: 9:00 a.m.
Department: 8
Judge: Hon. James Ware

To DEFENDANT/COUNTER CROSS-CLAIMANT Stephen Mangelsen ("Mangelsen"):

PLEASE TAKE NOTICE that on September 15, 2008 at 9:00 a.m., or as soon thereafter
as the matter may be heard in the courtroom of the Honorable James Ware, Department 8,
located at 280 South 1st Street, San Jose, California 95113, plaintiff Fluke Electronics

**FLUKE ELECTRONICS CORPORATION'S MOTION TO DISMISS FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN BE GRANTED (RULE 12(b)(6))**

Case No. C 08 01188 JW

1 Corporation ("Fluke") will move for an order dismissing the First and Second Causes of Action
2 in Mangelsen's cross-complaint.

3 **STATEMENT OF RELIEF SOUGHT**

4 Fluke moves to dismiss the First and Second Causes of Action in Mangelsen's cross-
5 complaint alleging common counts and breach of contract on the grounds that they fail to state
6 claims upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). The common counts
7 cause of action alleges that an accounting is necessary to determine the nature and extent of
8 Fluke's exhaustion of funds set aside in escrow pursuant to the Merger Agreement to defray
9 legitimate patent infringement claims, but no accounting is required or provided for in the
10 Merger Agreement. In addition, the distribution, accounting, and exhaustion of said funds have
11 been fully settled pursuant to the terms set forth in paragraph 1(a) of the September 14, 2007
12 settlement agreement. The breach of contract action alleges that Fluke breached the Merger
13 Agreement by failing and refusing to consent to release of the monies set aside in escrow, which
14 the Merger Agreement required to be distributed to the Common Equityholders at regular
15 intervals in regular amounts. However, the funds in escrow have been released to the Common
16 Equityholders pursuant to the terms set forth in paragraph 1(a) of the September 14, 2007
17 settlement agreement. Pursuant to the settlement agreement the escrow funds were released from
18 the fund and credited to the settlement. This release of funds was executed by all parties,
19 including Cliff Warren, the representative for the Common Equityholders as defined in the
20 Merger Agreement. Accordingly, Fluke moves to dismiss the common counts and breach of
21 contract causes of action in Mangelsen's cross-complaint.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **ISSUES TO BE DECIDED**

24 Should the First Cause of Action in Mangelsen's cross-complaint alleging common
25 counts be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed.
26 R. Civ. P. 12(b)(6)?

1 Should the Second Cause of Action in Mangelsen's cross-complaint alleging breach of
2 contract be dismissed for failure to state a claim upon which relief can be granted pursuant to
3 Fed. R. Civ. P. 12(b)(6)?

4 **STATEMENT OF FACTS**

5 Plaintiff Fluke filed a complaint for breach of contract and declaratory relief on February
6 28, 2008. (Document 1) The complaint alleges breach of contract against Mangelsen for failure
7 to pay to Fluke Corporation his pro rata share of the total payment of the settlement between the
8 former Raytek shareholders, including Mr. Mangelsen, and Fluke, in accordance with the terms
9 of the September 14, 2007 Settlement Agreement. Attached as **Exhibit A** is a copy of the
10 Settlement Agreement.

11 Defendant Mangelsen has filed a cross-complaint against Fluke asserting two causes of
12 action-common counts and breach of contract. (Document 26)

13 Defendant Mangelsen's First Cause of Action alleging common counts alleges that an
14 accounting is necessary to determine the nature and extend of Fluke's exhaustion of funds set
15 aside in escrow pursuant to the Merger Agreement to defray legitimate patent infringement
16 claims, but no accounting is required or provided for in the Merger Agreement.

17 Defendant Mangelsen's Second Cause of Action alleging breach of contract alleges Fluke
18 breached the Merger Agreement by failing and refusing to consent to release the monies set aside
19 in escrow pursuant to the Merger Agreement to defray legitimate patent infringement claims.

20 **CONTRACTS AT ISSUE**

21 In a case involving a contract, the court may examine the contract documents in deciding
22 a motion to dismiss. *See In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 889 (8th Cir.2002);
23 *Rosenblum v. Travelbyus.com, Ltd.*, 299 F.3d 657, 661 (7th Cir.2002). The court may also
24 take judicial notice of public records and may thus consider them on a motion to dismiss.
25 *Faibisch v. Univer. Of Minn.*, 304 F.3d 797, 802-03 (8th Cir.2002). In this matter, both the
26 complaint and defendant's cross-complaint plead and discussed the Settlement Agreement. As
27 such, the court may examine this contract in deciding this motion to dismiss.

ARGUMENT

Fluke moves to dismiss the First and Second Causes of Action in Mangelsen's cross-complaint alleging common counts and breach of contract on the grounds that it fails to state a claim upon which can be granted under Fed. R. Civ. P. 12(b)(6).

A. First Cause of Action-Common Counts

Paragraph 17 of the cross-complaint, in reference to the escrow funds set aside pursuant to the Merger Agreement to defray patent infringement claims, alleges, "An accounting is necessary to determine the nature and extent of Fluke's exhaustion of said funds."

Under the terms of the Merger Agreement, there is no requirement for Fluke to provide for an accounting of the funds in the escrow account. Pursuant to the September 14, 2007 Settlement Agreement, the escrow funds were credited to the settlement reached by the parties.

The settlement between the Common Equityholders of Raytek and Fluke provided that the funds in escrow were released to Fluke to offset the amount owed by the Common Equityholders to Fluke. Therefore, the escrow fund was exhausted and defendant Mangelsen has received a credit or setoff against the final settlement for all money had and received by Defendant Fluke from the escrow fund as established by the Merger Agreement. Accordingly, Mangelsen's First Cause of Action does not allege any facts relating to Fluke's alleged failure to provide an accounting of monies from the escrow fund established by the Merger Agreement that would support a claim for common counts.

B. Second Cause of Action-Breach of Contract

Paragraph 23 of the cross-complaint alleges that Fluke breached the Merger Agreement

... by failing and refusing to consent to release of the monies set aside in escrow, which the Merger Agreement required to be distributed to the Common Equityholders at regular intervals in regular amounts, with the final distribution to take place on March 31, 2004.

As set forth above, the escrow funds were in fact released to the Fluke for the benefit of the Common Equityholders, including Mangelsen, pursuant to the Merger Agreement and Settlement Agreement. As outlined in paragraph 1(a) of the Settlement Agreement, the total amount of funds remaining in the escrow were released to Fluke and credited to the Common

1 Equityholders, thereby reducing their total financial obligation to Fluke. Given that the funds in
2 escrow were released to the Common Equityholders, which includes the defendant, there are no
3 facts within the defendant's cross-complaint upon which an action for breach of contract against
4 Fluke by Mangelsen could be supported.

5
6 **CONCLUSION**

7 Mangelsen's First and Second Causes of Action alleging common counts and breach of
8 contract should be dismissed. Each of the alleged grounds for those causes of action fails to state
9 a claim upon which relief can be granted.

10
11 DATED: August 4, 2008

Respectfully submitted,

12 BARBER LAW GROUP

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14 /s/ Bryan M. Barber

15 Bryan M. Barber
16 Attorney for Plaintiff and Cross-Defendant
FLUKE ELECTRONICS CORPORATION

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**MANUAL FILING NOTIFICATION
(EXHIBIT A TO FLUKE ELECTRONICS
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**RE: FLUKE ELECTRONICS CORPORATION'S NOTICE OF AND BRIEF IN
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This filing is in paper or physical form only, and being maintained in the case file in the
Clerk's office. If you are a participant in this case, this filing will be served in hard-copy via

1 regular mail. For information on retrieving this filing directly from the court, please see the
2 court's main website at <http://www.cand.usgcourts.gov> under Frequently Asked Questions
3 (FAQ).

4 This exhibit is not e-filed because it is designated as confidential and to be filed under
5 seal.

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7
8 DATED: August 4, 2008

Respectfully submitted,

9 BARBER LAW GROUP

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11 /s/ Bryan M. Barber

12 Bryan M. Barber
13 Attorney for Plaintiff and Cross-Defendant
14 FLUKE ELECTRONICS CORPORATION

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